STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 16

October 31, 2000

Requested by: ROSALIE DVORAK-REMIS AND THE SACRAMENTO LITTLE POCKET NEIGHBORHOOD ASSOCIATION

Concerning: CALIFORNIA DEPARTMENT OF TRANSPORTATION **interpretation of exclusive public use restrictions found in surplus right-of-way property deeds**

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Does an interpretation of language in a deed restriction utilized by the California Department of Transportation constitute a "regulation" as defined in Government Code section 11342, subdivision (g), which is required to be adopted pursuant to the Administrative Procedure Act (Gov. Code, div. 3, tit. 2, ch. 3.5, sec. 11340 et seq.; hereafter, "APA")? [1]

---

1. This request for determination was filed by Rosalie Dvorak-Remis, individually and on behalf of the Sacramento Little Pocket Neighborhood Association, 970 Casilada Way, Sacramento, CA, 95822-1718, (916) 448-3247. The California Department of Transportation's response was filed by Cheryl D. McNulty and Yvonne von Brauchitsch, staff attorneys, Department of Transportation Legal Division, 1120 N Street (MS-57), Sacramento, CA. 95814, (916) 654-2630. This request was given a file number of 99-018. This determination may be cited as "**2000 OAL Determination No. 16.**"

CONCLUSION

An interpretation of language in a deed restriction utilized by the California Department of Transportation under the facts presented does not constitute a "regulation" as defined in Government Code section 11342, subdivision (g), which would be required to be adopted pursuant to the APA because it is not applied as a standard of general application.

BACKGROUND

The California Department of Transportation ("Caltrans") is authorized by statute to sell excess property previously acquired by the State for highway purposes. (Sts. & Hy. Code, sec. 118; Gov. Code, sec. 14012.) Conditions and restrictions governing these sales are established by the California Transportation Commission ("Commission"). (Sts. & Hy. Code, sec. 30410.)

On October 28, 1998, the Commission adopted Resolution G-98-22 which established general procedures for the sale of excess property. Section 2.2 of this resolution permits Caltrans to sell excess property to other public agencies as long as its "intended use shall be for a public purpose."[2]

In 1975, Caltrans conveyed to the City of Sacramento excess highway property located between Interstate Highway 5 and the Sacramento River. Inserted in the deed is the following restriction:

> "It is expressly made a condition herein that the conveyed property be used *exclusively for public purposes*; that if said property ceases to be used exclusively for public purposes, all title and interest to said property shall revert to the State of California, Department of Transportation, and the interest held by the grantee(s), named herein, or its/their assigns, shall cease and terminate at such times." [Emphasis added.][3]

Subsequently, the City of Sacramento ("City") contemplated entering into a lease agreement with the owners of a proposed development known as the Captain's Table Project.[4] The City requested that Caltrans review and approve the proposed

---

2. Caltrans response, dated June 16, 2000, Exhibit 1, section 2.2.
3. Exhibit "A-3," attached to request for determination.
4. See memorandum from City of Sacramento to Caltrans, dated January 25, 1999, attached to request for determination. See also letter dated May 12, 1999, from Caltrans to Ms. Dvorak-Remis.

use of the property under the lease.[5] After reviewing the Director's Deed and the lease, Caltrans found the proposed use of the property under the lease to be compatible with the exclusive public use provision contained in the Director's Deed.[6] The lease agreement was subsequently approved and executed by the tenant and the City. The lease permitted the tenant to provide public parking in conjunction with the proposed Captain's Table Project and required the tenant to include public easements for access from or through the premises to the Sacramento River and recreational easements to the City of Sacramento for a pedestrian and bikeway in, about, or through the premises.[7]

The existence of the lease between the City and the Captain's Table Project triggered questions concerning the "exclusive public use restriction" found in the Caltrans excess property deed. In the spring and summer of 1999, the subject of "exclusive public use" was the topic of several conversations between the requester and representatives of Caltrans. According to the requester, on four separate occasions, a Caltrans attorney, the Excess Lands Manager, and the Area Manager all indicated to the requester that the exclusive public use restriction is met whenever "the public is not barred from the premises."[8] These statements are the basis of this regulatory determination.

ANALYSIS

A determination of whether the agency's criteria are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the agency, (2) whether the challenged policy contains "regulations" within the meaning of Government Code section 11342, and (3) whether the challenged policy falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted by statute are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121

---

5. Memorandum from City of Sacramento to Caltrans, dated January 25, 1999, attached to request for determination.
6. Letter from Caltrans to City of Sacramento, dated February 2, 1999, attached to request for determination.
7. See Ground Lease between City of Sacramento and Captains Table Hotel, LLC (City Agreement No. 99-150), p. 2.
8. Request for determination, p. 2.

Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, sec. 11342, subd. (a), and sec. 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Gov. Code, sec. 11000.) Caltrans is in neither the judicial nor legislative branch of state government, nor has it been expressly or specifically exempted by statute from complying with the APA. OAL concludes, therefore, that APA rulemaking requirements generally apply to Caltrans. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342, subdivision (g), defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274-275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." (*Ibid.*)

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223

Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342, subdivision (g), a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this analysis, we are guided by the California Court of Appeal in *Grier v. Kizer*, *supra*:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.[9])

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

Caltrans denies that its interpretations of the public use restrictions in its deeds of excess property constitute regulations under the APA on several grounds. First, it

---

9. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.

maintains that it does not have authority to issue regulations relating to the interpretation of restrictions placed in deeds of its excess lands because the Commission possesses the exclusive authority, which it does not delegate to Caltrans, to establish terms, standards, and conditions subject to which the lands are to be sold. However, the test for the existence of a "regulation" is not whether there is sufficient authority or legal capacity, but rather the "*effect and impact on the public*" of the agency action. (*Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d 120, 127, 174 Cal.Rptr. 744, 747; emphasis added.) Thus, any lack of authority to adopt regulations would not nullify the existence of a rule or policy that may contravene the APA.

Second, Caltrans maintains that the issue should be deemed moot because the restrictive use conditions and reversionary clauses are no longer being included in the Director's Deeds for the sale of excess lands.[10] Because deeds of excess lands with the public use restrictive provisions remain in existence, such as the instant deed, we think that the issue cannot be deemed moot.

Third, Caltrans maintains that the deed restriction language that it includes in the deeds merely restates the language adopted by the Commission by resolution at a public hearing.[11] In this connection, we point out that the issue in this determination is not whether the language included in the deed restriction adopted by the Commission pursuant to resolution violates the APA, but whether Caltrans' *interpretation* of the language constitutes a regulation subject to the APA.

With respect to the issue of agency interpretations of other rules or policies, the California Supreme Court recently held that written interpretive policies of the Division of Labor Standards Enforcement ("DLSE") contained in its Operations and Procedures Manual interpreting APA exempt wage orders of the Industrial Welfare Commission ("IWC") are themselves regulations that are void because they were not promulgated in accordance with the APA. (*Morillion v. Royal Packing Co.* (2000) 94 Cal.Rptr.2d 3; following *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186.)

We think that Caltrans' interpretations of the language contained in its deed restrictions relating to exclusive public use may be analogous to the interpretive policies of the DLSE. As in *Morillion* and *Tidewater*, we have a commission with authority to adopt policy and rules and a subsidiary agency that implements those policies in various ways including the interpretation of those policies and rules.

---

10. Caltrans responses, dated July 3, 2000, pp. 2-3 and July 11, 2000, p. 1.
11. Caltrans response, dated June 16, 2000, p. 2.

However, in *Morillion* and *Tidewater*, the DLSE, the agency interpreting the wage orders of the IWC, established certain interpretive policies in writing and set them forth in an Operations and Procedures Manual. There was no dispute as to whether the interpretive policies existed or whether they were applied as rules of general application.

In contrast, in the instant circumstance, we have an allegation by the requester based on oral conversations with Caltrans staff, relating to a specific deed restriction, that, as a general matter, the exclusive use condition in Caltrans deeds is satisfied when the public is not barred from the premises. This does suggest that Caltrans interprets similar language in its deeds of excess property similarly, which would amount to a standard or rule of general application. Moreover, Caltrans acknowledges that the conversations with their representatives took place.

However, Caltrans maintains that it has no general policy regarding the interpretation of the language in the deed restriction and that the comments of its employees are limited to the application of the language to the specific property in question. Caltrans, in its response to the request states as follows:

> ". . .The interpretation given by Caltrans employees to Ms. Dvorak-Remis to her inquiry regarding the specific property in the Captain's Table Project was meant to respond to her particular question regarding that specific deed. Although it is stated in [OAL's] request that 'the statements attributed to Caltrans representatives appear to be about a general policy concerning the manner in which the public use restriction is or has been interpreted,' there is no such policy, general or otherwise, at Caltrans. That response was given in answer to Ms. Dvorak-Remis' specific question regarding a specific clause in that specific deed covering that specific parcel. Caltrans' representatives informed Ms. Dvorak-Remis that they determined that the City's use of the property did not constitute a violation of the public use restriction such that it was necessary to invoke the reversionary clause. In any such inquiry, Caltrans' representatives would assess each deed and its restrictions individually and independently.
>
> ". . . .
>
> "Caltrans is willing to state, for the record, that the language used in response to this particular inquiry, i.e., 'the exclusive use condition is met when the public is not barred from the premises' is not a policy adopted by

Caltrans to be used to interpret the exclusive public use language used in Director's deeds."[12]

While the comments attributed to the Caltrans employees do suggest the existence of a standard of general application, we think the unequivocal official statement of the management of Caltrans that the interpretation in question is not one that is applied generally, and, in this case, is limited to the deed in question, is sufficient to persuade us that there is no interpretation of deed language that is generally applied rising to a level of a "regulation" that must be adopted in accordance with APA procedures.

CONCLUSION

The interpretation of language in the deed restriction utilized by the California Department of Transportation under the facts presented does not constitute a "regulation" as defined in Government Code section 11342, subdivision (g), which would be required to be adopted pursuant to the APA because it is not applied as a standard of general application.

DATE: October 31, 2000

DAVID B. JUDSON
Deputy Director and Chief Counsel

DEBRA M. CORNEZ
Senior Staff Counsel
Determinations Program Coordinator

DAVID B. JUDSON
Deputy Director and Chief Counsel

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 8-473-6225
Facsimile No. (916) 323-6826
Electronic Mail: staff@oal.ca.gov

i:\2000.16

12. Response, dated July 28, 2000, pp. 1 – 2.